

**ORIGINAL**

BEFORE THE

JUN 15 1993

**Federal Communications Commission**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

WASHINGTON, D.C. 20554

In re Applications of

MM DOCKET NO. 93-42

MOONBEAM, INC. )

File No. BPH-911115MG )

GARY E. WILLSON )

File No. BPH-911115MO )

For a Construction Permit )  
New FM Station on Channel 265A )  
in Calistoga, California )**RECEIVED**TO: The Honorable Edward Luton  
Administrative Law Judge

JUN 15 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**REPLY TO OPPOSITION TO  
SECOND PETITION TO ENLARGE ISSUES**

Gary E. Willson (Willson) files this reply to the Opposition to Second Petition to Enlarge Issues filed by Moonbeam, Inc. (Moonbeam). Willson seeks addition of financial qualification and false financial certification issues against Moonbeam.

Moonbeam attempts to gloss over and trivialize Willson's Second Petition to Enlarge Issues. Its efforts cannot withstand even a moderate degree of scrutiny. First, Moonbeam accuses Willson of making, "the incredible argument that Moonbeam's March 2, 1992 amendment to its application reflects a change in its source of its funding ...." Willson responds by noting these facts:

- (1) The source of funding in Moonbeam's initial application

- (3) In response to the Standardized document Production Request, Moonbeam provided a document which purported to identify yet a third source of funding -- an account in the name of Mary F. Constant, Abbie & Bianco Retirement Fund.

Moonbeam claims that its March 2, 1992 amendment was a

and that the amendment says nothing

More importantly, Moonbeam has provided nothing that demonstrates Moonbeam is financially qualified in response to the material and substantial questions raised in Willson's Petition. Moonbeam fails to provide the personal financial statement of Mary Constant, which it now claims for the first time exists. Moonbeam's opposition on this point is quite revealing. Moonbeam provides the declaration of Mary Constant, who claims that at the time she signed the application and the March 1992 amendment, she, "had available to me my own balance sheet reflecting my assets and liabilities. The amount set forth as the account balance in Exhibit A was at the time available for construction of the station and station operations as it is now."<sup>1</sup> Decl. at ¶6. Mary Constant does not say that she has or had assets, liquid or otherwise, in excess of current liabilities. Funds in

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<sup>1</sup> Exhibit A is the account statement for the Abbie & Bianco Retirement Account. This statement is for a period following the date the application was filed. The Abbie & Bianco Retirement Account on its face raises questions about the sufficiency of available funds to operate and construct. In her declaration, Mary Constant confirms that the Abbie & Bianco Retirement Fund showing a net value of \$190,873.18 is a retirement account. As such, it appears that it would be subject to taxation which would reduce the amount available to below the \$95,000 required to construct and operate the station for 3 months. The U.S. Tax Code provides for a 10% penalty for early disbursement of retirement funds. The funds would then be subject to federal taxes at a rate of up to 33%. In addition, other taxes would likely be due, such as California personal income taxes up to 11%. See CA Rev. & Tax Code 17041. This would leave a remaining balance of \$91,619 -- less than the already low amount Moonbeam estimates it will cost to construct and operate the station.

Moonbeam makes a surprising assertion in note 2 of its Opposition that even if Ms. Constant incurs withdrawal penalties or tax consequences, this has no bearing on Moonbeam's financial qualifications. Assuming Ms. Constant intends to pay her taxes, this potential tax liability is clearly short-term liability having a direct impact on the total funds available.

the Abbie & Bianco Retirement Account could be available despite current existing liabilities exceeding assets. These serious

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subsequent Petition to Enlarge, asserts there has been a balance sheet all along, but the balance sheet was lost, and now recently found, but not produced. See Beaumont Branch of the NAACP v. FCC, 854 F.2d 501 (D.C. Cir. 1988)(pattern of inconsistencies and misstatements required remand); see also, California Public Broadcasting Forum v. FCC, 752 F.2d 670, 679 (D.C. Cir. 1988)("It is fundamentally unfair for [the] FCC to dismiss a challenge where the challenging party has seriously questioned the validity of a representation and the defending party is a party with access to the relevant information"); Weyburn Broadcasting Limited Partnership v. FCC, No. 91-1378, 71 RR2d 1386, 1393 (D.C. Cir. 1993) (case remanded on financial misrepresentation issue based in part on conflicting story).

Willson also submitted a tax lien filed by the State of California against Mary Constant and her husband, Fred Constant, in the amount of \$13,291.40. The lien was filed on December 14, 1992 and not released until over 4 months later on April 14, 1993. Moonbeam claims the lien does not reflect either an inability or unwillingness to pay taxes legally owed and claims that Las Americas Communications, Inc., 101 FCC2d 729 (Rev. Bd. 1985) cited by Willson is not applicable because the tax lien existed at the time the applicant signed the financial certification. This is a distinction without any significance. The Review Board's concern was with outstanding tax liens against the party purporting to provide financing. The Review Board noted, "We are convinced that a movant has met his prima facie burden where, as here, he demonstrates that a principal upon whom the



discovery of the totality of the facts warranting enlargement of issues.

Moonbeam cites Great Lakes Broadcasting, Inc., 6 FCC Rcd. 4331 (1991). There a Petition to Enlarge filed after the Initial Decision had been rendered and based on no newly discovered evidence was found untimely. In the more recent Frank Digesu, 7 FCC Rcd. 5459 at n. 7 (1992), the Commission rejected untimeliness arguments. In that case, the proponent of the issue had evidence which was discovered long before the 15-day newly discovered time period, but the Commission considered the Petition timely filed and remanded the proceeding to the Administrative Law Judge.

In sum, the requested issues are warranted:

- (1) Moonbeam in response to document production stated that Mary Constant had no personal financial statement. Now Moonbeam claims there is such a statement.
- (2) Moonbeam fails to submit the financial statement despite substantial and material questions raised by Willson.
- (3) Mary Constant states in her declaration that she reviewed her assets and liabilities and that the funds available in the Abbie & Bianco Retirement Account were available. The statement is carefully worded. There is no affirmative statement that her assets exceed current liabilities.
- (4) The Abbie & Bianco Retirement Fund statement reveals that, after taking into consideration likely tax liabilities, there will be insufficient funds available to meet the already low projected costs to operate and construct the station.
- (5) There is no written agreement between Mary Constant and Moonbeam, Inc. as required by the Commission committing Ms. Constant to provide funds to the corporation or setting forth the terms of any loan to the corporation.
- (6) During a recent four-month period, there was a significant outstanding tax lien pending against Ms. Constant.

WHEREFORE, it is respectfully requested that Willson's  
Second Petition to Enlarge Issues be granted.

Respectfully submitted,

GARY E. WILLSON

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By A. Wray Fitch III  
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His Attorney

June 15, 1993

[0068/c93awfReply]

**CERTIFICATE OF SERVICE**

I, George Culver, in the law offices of Gammon & Grange, hereby certify that I have sent, this 15th day of June 1993, by first-class, postage-prepaid, U.S. Mail, copies of the foregoing **REPLY TO OPPOSITION TO SECOND PETITION TO ENLARGE ISSUES** to the following:

\* The Honorable Edward Luton  
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